A photograph of a rocky stream bed with moss and water. The rocks are covered in green moss and are partially submerged in clear, shallow water. The background shows more rocks and some dry branches.

“Foster” (City of Yelm) Mitigated Water Permits

Robin McPherson
Assistant Attorney General
Department of Ecology
Water Resources

Washington Water Law

- Prior Appropriation
- Types of water rights
 - Permits RCW 90.03.290
 - Permit-exempt wells RCW 90.44.050
 - Instream flows RCW 90.03.247

Instream Flows

- Flows and closures set by Ecology rulemaking
WAC 173-501 through 173-559
- Appropriations with priority dates
- Cannot be impaired by later surface water or connected groundwater (*Postema v. PCHB*, 2000)

Instream Flows

- Rules cannot be amended to “carve out” streamflow for permits or permit-exempts (*Swinomish v. Ecology*, 2013)
- Exempt wells not allowed to impair senior instream flows
- Even where Ecology does not permit, County is responsible for ensuring available water through building and zoning (*Kittitas and Hirst*)

Yelm's Permit Application

- New city well would impair Nisqually and Deschutes basin instream flows and closures
 - “In-kind” (water for water) mitigation effectively cancelled most impacts
 - “Out of kind” (mitigation to directly improve habitat)
- “OCPI” for withdrawals that would conflict with base flows
 - “shall be authorized only in those situations where it is clear that overriding consideration of the public interest will be served.
 - RCW 90.54.020(3)(a)

PCHB Upheld Yelm Permit

1. OCPI used when water is for a public purpose
2. Every feasible in-kind mitigation option was exhausted
3. All impacts were “fully mitigated and trackable over time”
4. Out-of-kind benefits to fish and stream habitat were “significant and clearly established through sound science”
5. “Permanent and net ecological benefit to affected streams, more than sufficient to offset minor depletion of water.”

PCHB Upheld Yelm Permit

6. Conservative hydrologic model
7. Model was external, professional, and peer reviewed
8. Small depletion with zero or minimal impact to water resources
9. Water added during fish-critical times
10. Stakeholder support
11. Consistent with watershed plans
12. Conservation and reclaim of water

Conclusion: Yes – this is a case for OCPI

INSTREAM FLOWS IN THE DESCHUTES RIVER BASIN

(in Cubic Feet per Second)

USGS Gage
212-0800-00
Deschutes
River

Month	Day	River
Jan.	1	400
	15	400
Feb.	1	400
	15	400
Mar.	1	400
	15	400
Apr.	1	350
	15	(Closed)
May	1	(Closed)
	15	(Closed)
June	1	(Closed)
	15	(Closed)
July	1	(Closed)
	15	(Closed)
Aug.	1	(Closed)
	15	(Closed)
Sept.	1	(Closed)
	15	(Closed)
Oct.	1	(Closed)
	15	(Closed)
Nov.	1	150
	15	200
Dec.	1	300
	15	400

INSTREAM FLOWS IN THE DESCHUTES RIVER BASIN

(in Cubic Feet per Second)

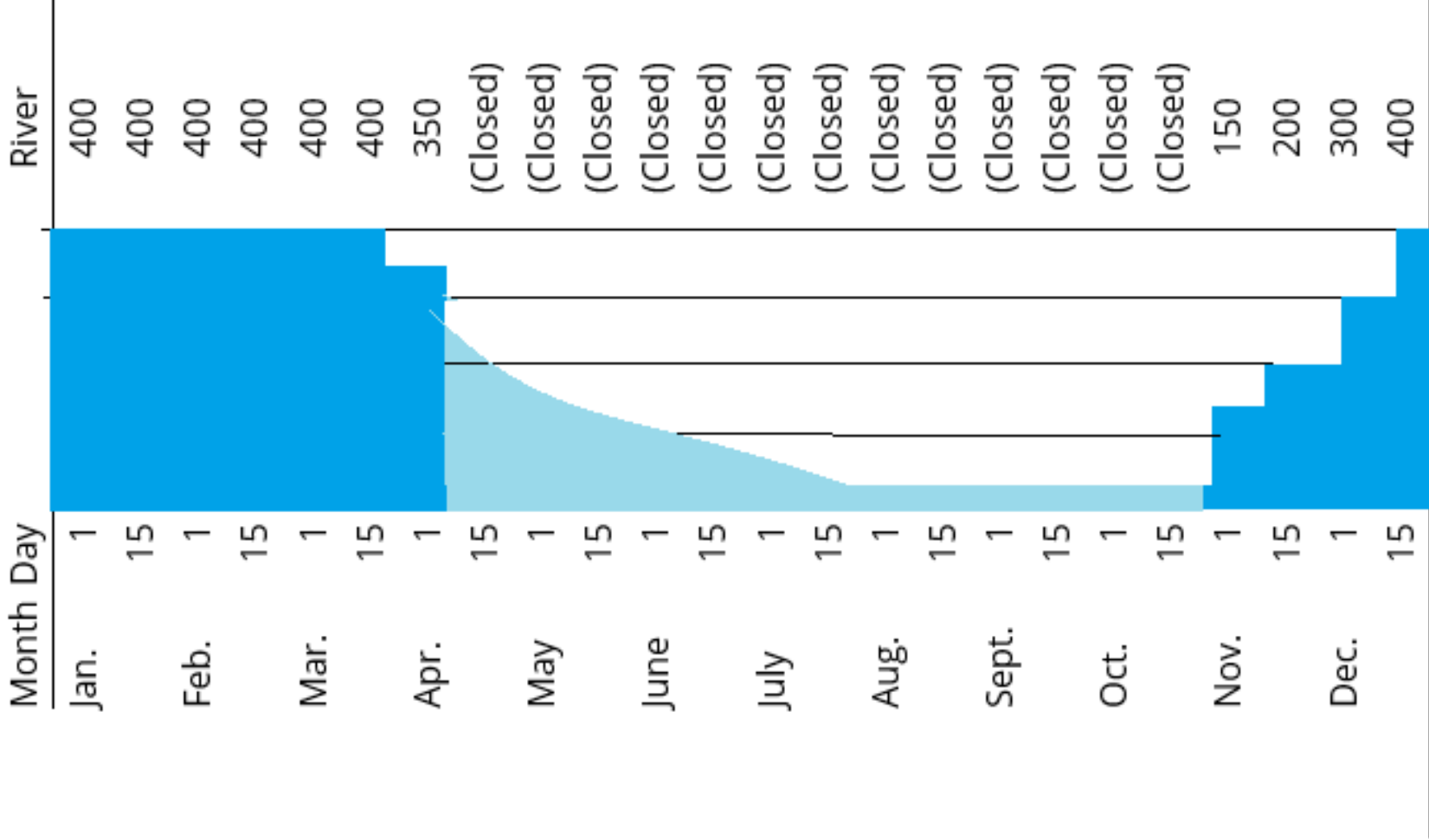
USGS Gage
212-0800-00
Deschutes

Month	Day	River
Jan.	1	400
	15	400
Feb.	1	400
	15	400
Mar.	1	400
	15	400
Apr.	1	350
	15	(Closed)
May	1	(Closed)
	15	(Closed)
June	1	(Closed)
	15	(Closed)
July	1	(Closed)
	15	(Closed)
Aug.	1	(Closed)
	15	(Closed)
Sept.	1	(Closed)
	15	(Closed)
Oct.	1	(Closed)
	15	(Closed)
Nov.	1	150
	15	200
Dec.	1	300
	15	400

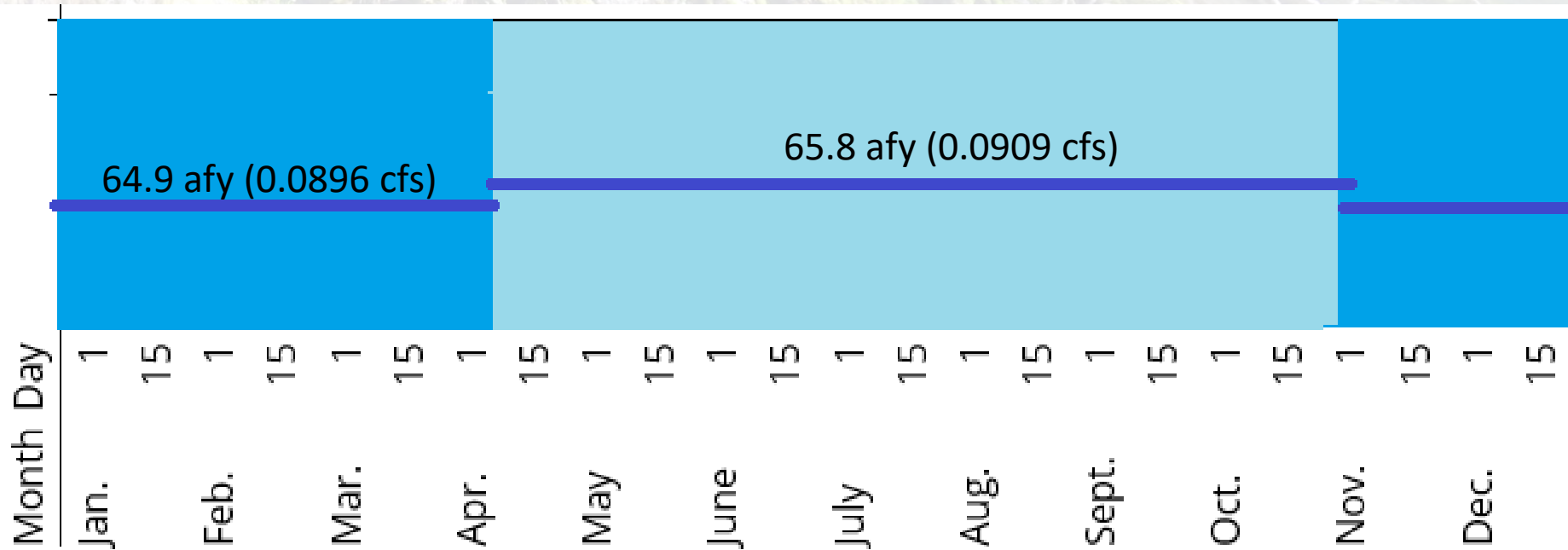
INSTREAM FLOWS IN THE DESCHUTES RIVER BASIN

(in Cubic Feet per Second)

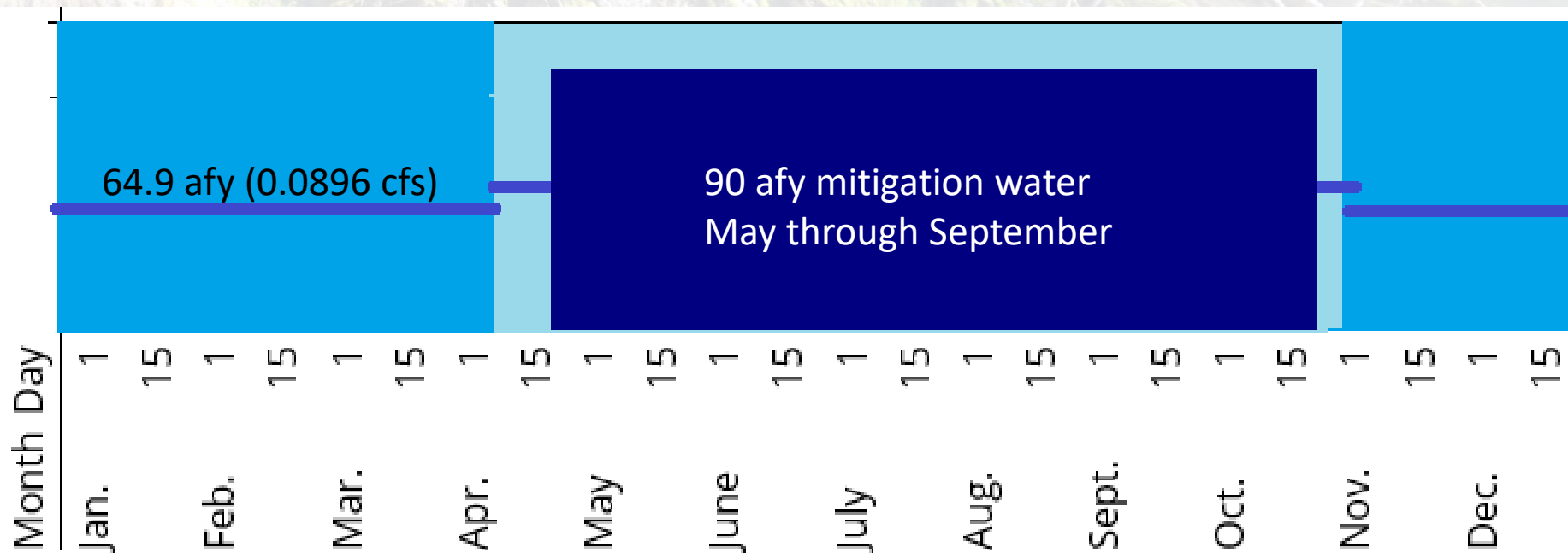
USGS Gage
212-0800-00
Deschutes
River



Yelm Well Impact in Deschutes Basin (Zoom in – different units)

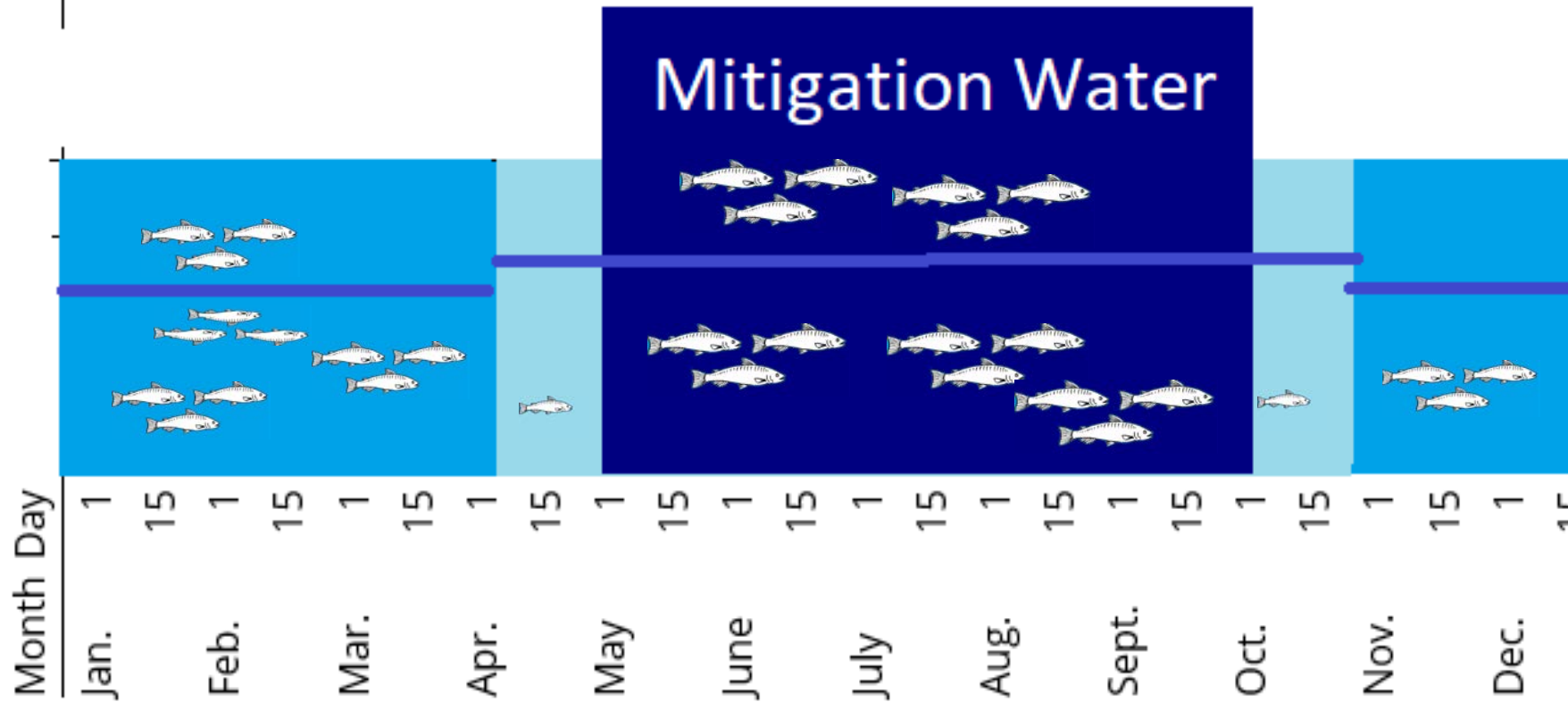


Yelm Pro-rated Mitigation in Deschutes Basin



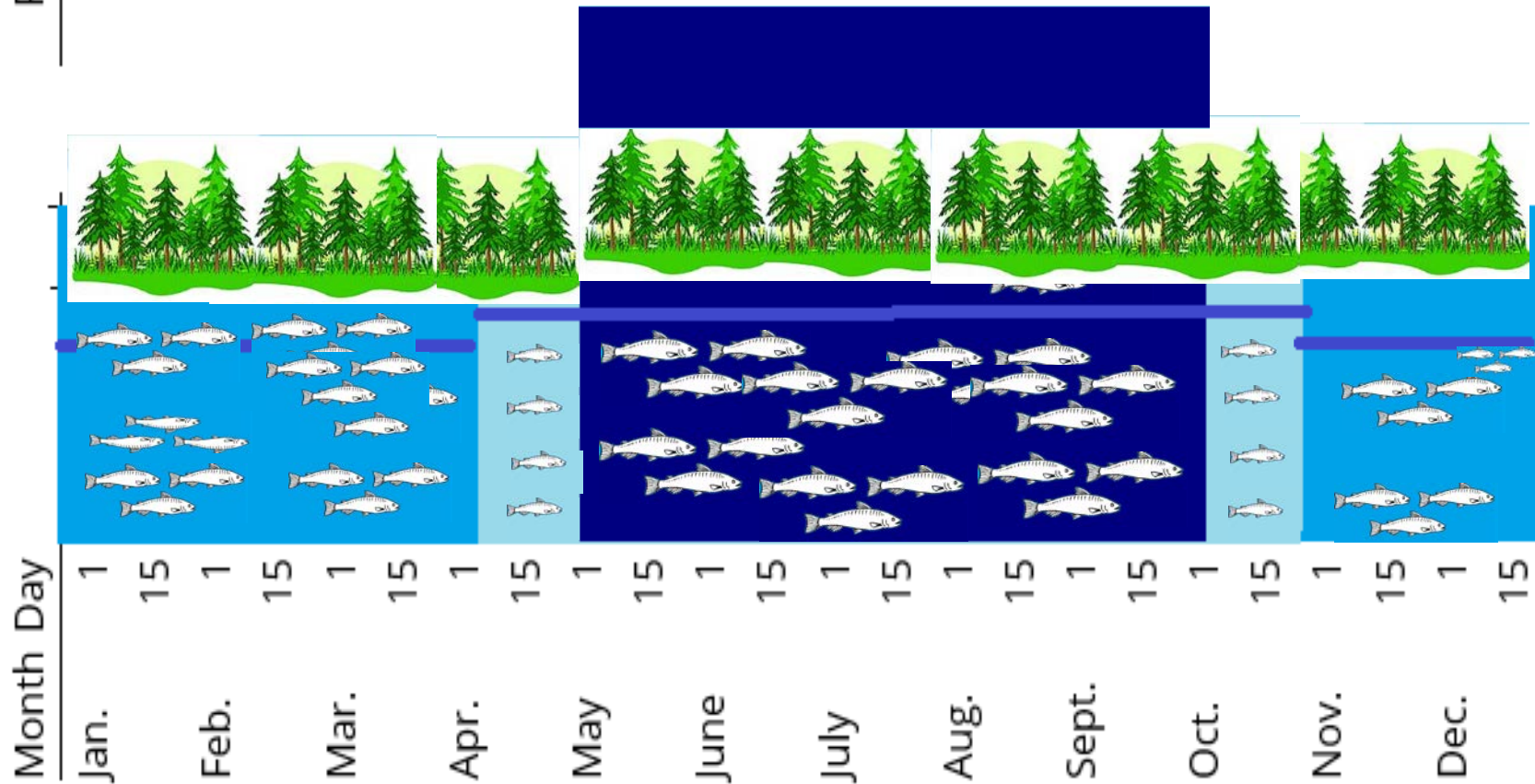
Deschutes River

“Shoulder seasons” – Gaps between irrigation rights and closure season



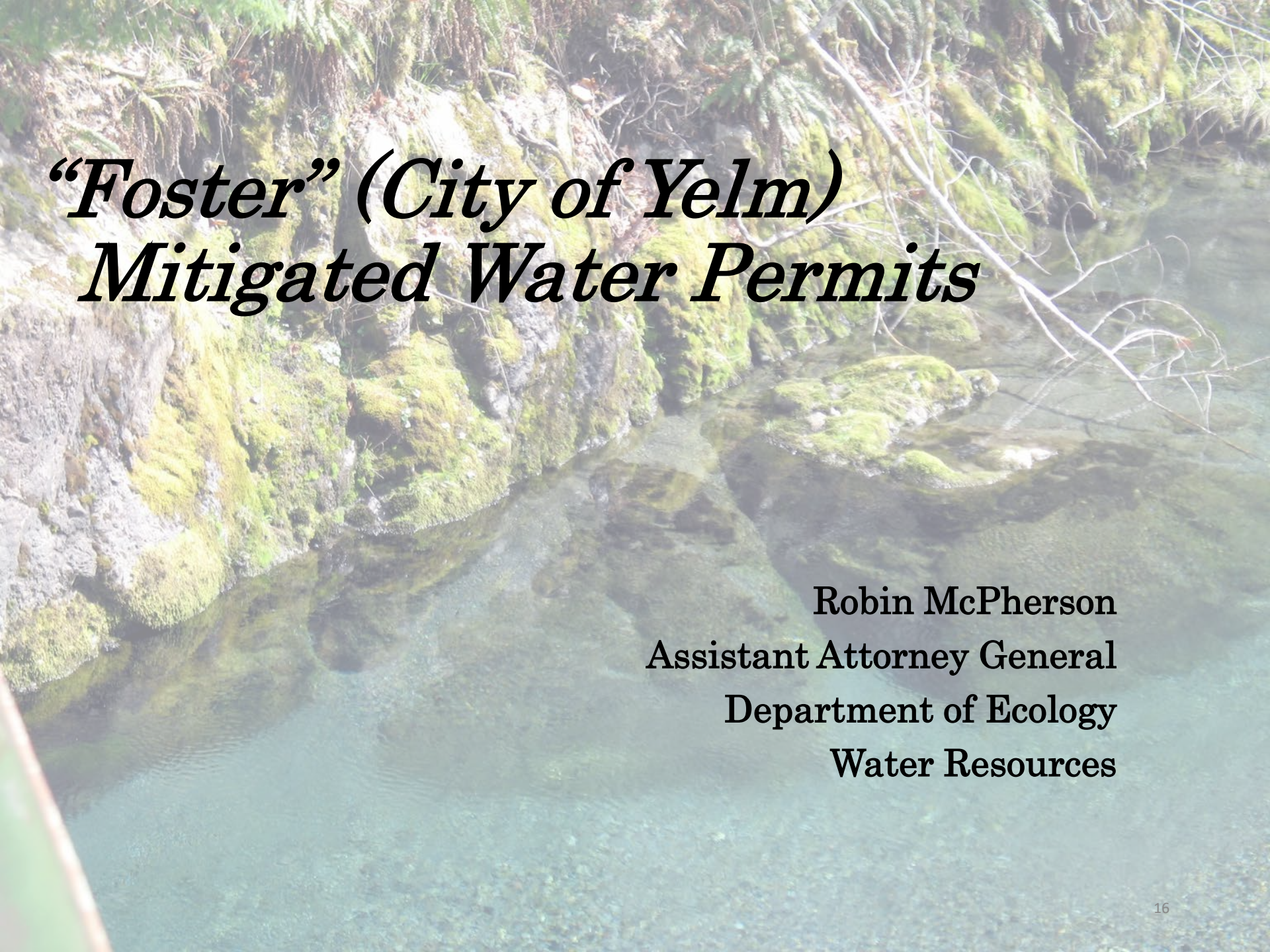
Deschutes River

“Out-of-kind” – enhance habitat directly to get the most from the water we have



Foster Supreme Court Decision (2015)

- Did not dispute the “12 factors” – Acknowledged the “net ecological benefit”
- But that’s not enough for OCPI
- Court Concluded: Permanent water use cannot interfere with base flows –
. . . . no matter how O-the-CPI

A photograph of a rocky stream bed with moss and water. The rocks are covered in green moss and some have small plants growing on them. The water is clear and reflects the surrounding greenery. The background shows more rocks and some bare branches.

“Foster” (City of Yelm) Mitigated Water Permits

Robin McPherson
Assistant Attorney General
Department of Ecology
Water Resources